EX[illegible]DATE FILED

Federal Communications Commission
Washington, D.C. 20554

MAY 3 1996

RECEIVED
MAY - 9 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The Honorable Michael R. McNulty
U. S. House of Representatives
Leo W. O'Brien Federal Building, Room 827
Albany, New York 12207

[illegible] ORIGINAL

Dear Congressman McNulty:

Thank you for your letter of March 22, 1996, on behalf of your constituent, Timothy J. Rule, regarding the Commission's decision to freeze acceptance of paging applications. Mr. Rule expresses concern that his paging application has not been granted because of the implementation of the freeze.

The Commission is currently conducting a rulemaking proceeding that proposes to transition from licensing paging frequencies on a transmitter-by-transmitter basis to a geographic licensing approach, using auctions to award licenses where there are mutually exclusive applications. In conjunction with that proceeding, the Commission initially froze processing of applications for paging frequencies. On April 23, 1996, the Commission released a First Report and Order in **WT Docket 96-18** and PP Docket 93-253, which adopted interim measures governing the licensing of paging systems and partially lifted the interim freeze for incumbent paging licensees. For your convenience and information, enclosed is a copy of the Press Release concerning the First Report and Order, which includes a summary of the principal decisions made. Specifically, small and medium sized incumbent paging companies will be permitted to expand their service areas if the proposed new site is within 65 kilometers (40 miles) of an authorized and operating site. These interim rules will remain in effect until the Commission adopts final rules in the paging proceeding.

Thank you for your inquiry.

Sincerely,

David L. Furth
Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

Enclosure

[illegible] 1
[illegible]

COMMITTEE ON INTERNATIONAL RELATIONS

SUBCOMMITTEE:

INTERNATIONAL ECONOMIC POLICY AND TRADE

WASHINGTON OFFICE:
2442 RAYBURN BUILDING
WASHINGTON, D.C. 20515-3221
(202) 225-5076

MICHAEL R. McNULTY
CONGRESS OF THE UNITED STATES
21ST DISTRICT, NEW YORK

DISTRICT OFFICES:

ROOM 827
LEO W. O'BRIEN
FEDERAL BUILDING
ALBANY, NY 12207
(518) 465-0700

U.S. POST OFFICE
SCHENECTADY, NY 12305
(518) 374-4547

33 2ND STREET
TROY, NY 12180
(518) 271-0822

9 MARKET STREET
AMSTERDAM, NY 12010
(518) 843-3400

PP-PAGING
1532

March 22, 1996

Ms. Lauren J. Belzin
Acting Director
Office of Legislative Affairs
Federal Communications Commission
Room 808
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Dear Ms. Belzin:

The attached communication from Mr. Timothy J. Rule is sent for your review.

I would appreciate it if you would investigate the enclosed statements and forward me the necessary information for reply.

Please send your reply to my Albany office, Leo O'Brien Federal Building, Albany, New York 12207.

Thank you for your consideration in this matter.

Sincerely,

Michael R. Mc Nulty
Member of Congress

MRM/mjs
Enclosure

PRINTED ON RECYCLED PAPER

Congressman Michael R. McNulty
Leo W.O'Brien Federal Bldg.
Room 827
Albany, NY 12207

March 12, 1996

RE: Expropriation of my 931 MHZ Pager License Application by the F.C.C.

Dear Congressman McNulty:

I am sending you this letter regarding a recent proposed ruling on February 9, 1996 by the F.C.C. The commission is putting a "freeze and retroactive annulment" on my 931 pager license which was filed, accepted and put on public notice in January of 1996. I filed in good faith with the commission, and this is a GROSS VIOLATION OF MY RIGHTS AS A CITIZEN OF THE UNITED STATES. I respectfully request immediate and strenuous intervention on my behalf. Enclosed is a letter from my Attorney John Pellegrin with his "comments" to the F.C.C. on my behalf.

Thank you in advance for your prompt evaluation and intervention.

Cordially,

Timothy J. Rule
19 Plum Avenue
Troy, NY 12180

cc: Senator Moynihan
Senator Bruno
Senator D'Amato
John D. Pellegrin

PLEASE STAMP AND RETURN
RECEIVED
MAR - 1 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before The
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

COMMENTS AND REQUEST FOR CLARIFICATION

Filed By:

JOHN D. PELLEGRIN, CHARTERED

Law Offices of John D. Pellegrin, Chartered
1140 Connecticut Avenue, N.W.
Suite 606
Washington, D.C. 20036
(202) 293-3831

Dated: March 1, 1996

II. Comments on FCC Proposal

The Commission's action with respect to applications filed in accordance with existing FCC rules is unfair and constitutes an unreasonable retroactive application of the Commission's rules. It is well-settled that the retroactive application of administrative rules and policies is looked upon with great disfavor by the courts.[4]

The retroactive extension of the freeze and interim processing rules to 931 MHz paging applicants in particular, filed as they were in accordance with the Rules and policies of the Commission then in effect at the time of filing, would not appropriately strike the balance between the significant mischief of disrupting

---

[4] *See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 208 (1988)(retroactivity is not favored in law); *Yakima Valley Cablevision v. FCC*, 794 F. 2d 737, 745 (D.C. Cir. 1986) ("Courts have long hesitated to permit retroactive rulemaking and have noted its troubling nature.")

the normal and routine 931 MHz paging licensing process and depriving applicants of their rights and equitable expectancies, versus the dubious benefit of auctioning spectrum which, as the Commission itself admits in the *Notice*,[5] is already heavily licensed.

When balancing the various harms and benefits of retroactive application of agency adjudicative decisions, courts have applied a five-factor test:

> (1) whether the issue presented is one of first impression; (2) whether the new rule represents an abrupt departure from well-established practice; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of burden which a retroactive rule imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[6]

The application of all five criteria militate against the Commission's freeze and proposed interim processing rules regarding previously-filed applications. This is a case of first impression for paging services. The Commission's proposed rules are a departure from the practice established in two recent Commission decisions.[7] In both cases, the Commission decided that equitable considerations barred the retroactive application of new rules to previously filed applications. The same equitable considerations

---

[5] See *Notice*, at ¶13 ("According to our records, CCP channels are heavily licensed, particularly in major markets.")

[6] Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) ("Retail Union").

[7] *Multipoint Distribution Service (Filing Procedures and Competitive Bidding Rules)*, 78 RR 2d 856 (1995) ("MDS Order"); *Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7387 (1994) ("Cellular Unserved Order").

are applicable in the instant situation, and the Commission should extend the same type of treatment to bar retroactivity in this case.

It is manifestly clear that the applicants in this case relied heavily on the former rule. Logic dictates that no reasonable person would file an application secure in the knowledge that the administrative agency accepting that application was about to change its rules rendering that application ungrantable. Applicants expended considerable resources to ensure their applications complied with Commission rules then in effect, relying completely on those sets of administrative guidelines. The retroactive burden imposed on the applicants is substantial, since the resources expended will be entirely wasted if the Commission holds these applications in abeyance and eventually dismisses them after the auction rules are adopted.

Finally, there is no statutory interest in applying the new rules that requires the draconian treatment proposed by the Commission. As noted *infra*, there is no valid reason to institute a freeze at all in this situation. The Commission could simply announce it will utilize auctions for those applications which proved ultimately to be mutually exclusive after the new rules are established. Dismissing pending applications in order to generate increased auction revenues is barred by Section 309(j)(7)(A) of the Communications Act. Consequently, the Commission's proposed rules fail the five-pronged test of *Retail Union*. Having so failed, the Commission should grandfather the pending applications and process

them under the rules in effect at the time the applications were filed.

In defense of its own actions, the Commission states that:

> We believe that after the public has been placed on notice of our proposed rule changes, continuing to accept new applications under the current rules would impair the objectives of this proceeding. We also note that this is consistent with the approach we have taken in other existing services where we have proposed to adopt geographic area licensing and auction rules. *Notice*, at ¶ 139. (emphasis supplied)

However, this approach is not consistent with the Commission's prior action taken with respect to 931 MHz paging licenses. As noted above, the Commission in the *Part 22 Rewrite Order* established new rules specifically for the 931 MHz paging service. It proposed a solution which properly looked forward by establishing rules for applications filed in the future, while simultaneously proposing processing rules handling previously filed applications. No filing freeze was imposed, despite the fact that notice was given that auction procedures would be established for applications filed in the future.

The Commission's treatment of applications pursuant to the recent *Part 22 Rewrite Order* completely belies the rationale for establishing an application freeze in the instant case, at least with respect to 931 MHz paging applications. Nor is there any need for an application freeze in this case, as there was no need in the *Part 22 Rewrite* situation. As will be seen in the Counterproposal below, any reopening of a filing window with respect to those applications already on file should result in few if any additional applications being filed.

First, no new windows would be opened under this Counterproposal with respect to applications not already on file. In addition, compliance with such reopened window, in terms of preparing and filing an application to meet the short filing period restrictions, would be difficult, if not impossible. The potential applicant would not only have to perform the standard frequency searches for available spectrum in a particular market, but in order to ensure acceptance, the applicant would have to first identify any available open filing window. This would require substantial review of FCC Public Notices and other filing records, as well as substantial engineering analysis. Compliance with such rigorous standards would necessarily result in competently-filed applications, an important public interest consideration.

cc: Commercial Wireless Division
File Copy
j:\congress\9601532